No. C-480

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

WALTER C. STROUD and HELEN E. STROUD, Plaintiffs-Appellees, v. THE CITY OF ASPEN, COLORADO, a municipal corporation, Defendant-Appellant.	Appeal from the District Court of the County of Pitkin State of Colorado Honorable Gavin D. Litwiller, Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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INTRODUCTION

The undersigned attorney, representing the Colorado Municipal League as Amicus Curiae, appears in support of Defendant-Appellant, the City of Aspen. The Colorado Municipal League is a non-profit voluntary association of two hundred twenty-one (221) cities and towns throughout the State of Colorado.

The brief of the Colorado Municipal League is directed at the principal issue of the case, namely, whether the off-street parking requirements of the City of Aspen constitute, under Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959), a violation of Article II, Section 15 of the Colorado Constitution. This brief does not address itself to the remaining five issues presented for review.

The Colorado Municipal League and its member municipalities have a vital interest in maintaining the ability of municipalities to adequately protect their citizens from hazards associated with the use of motor vehicles in the more densely populated areas of the State. One tool used by a number of municipalities in providing such protection has been the inclusion of off-street parking requirements within municipal zoning regulations. The authority of municipalities to adopt and enforce such requirements, however, was brought into serious question by the Court's opinion in Denver v. Denver Buick, Inc., supra (hereinafter referred to as Denver Buick).

In that case, the Court considered, among other issues, the validity of that portion of Denver's zoning ordinance which required the installation of off-street parking facilities in the City's B-6 zoning district. It is clear from the opinion that Denver's off-street parking requirements were found to be unconstitutional. The language used in the opinion, however, has raised considerable question as to its intended breadth. Were all municipal off-street

parking requirements deemed to be inherently unconstitutional? Or did the Court merely rule that Denver's specific off-street parking requirements unreasonably discriminated against the B-6 zoning district and were, for that reason, unconstitutional?

Perhaps in the hope that the latter interpretation of the opinion was correct, or perhaps in the hope that this Court would overrule the broader interpretation of the opinion when given an opportunity, a number of Colorado's municipalities have continued to include off-street parking requirements within their zoning regulations and have continued to enforce those requirements. This continued reliance by municipalities on off-street parking requirements as one tool in resolving the numerous problems created by the use of motor vehicles in urban areas, despite the language of the opinion in Denver Buick, points out the importance with which these requirements are viewed by Colorado's municipalities.

This Court is respectfully requested to affirm in principle the constitutionality of municipal off-street parking requirements and to either reverse Denver Buick or limit that opinion to the particular facts of the case.

STATEMENT OF THE ISSUES

The undersigned adopts the statement of issues appearing in the brief of the City of Aspen.

STATEMENT OF THE CASE

The undersigned adopts the statement of the case appearing in the brief of the City of Aspen.

SUMMARY OF THE ARGUMENT

The trial court erred in holding that, pursuant to the opinion of the Supreme Court in Denver Buick, the City of Aspen's off-street parking requirements constituted a taking of private property in violation of Article II,

Section 15 of the Colorado Constitution. Denver Buick does not stand for the proposition that municipal off-street parking requirements are invalid in principle. Rather, that opinion concluded that Denver's specific off-street parking requirements were unreasonably discriminatory, and any broader language in the opinion is simply dicta.

The great weight of authority upholds the general validity of municipal off-street parking requirements as a proper application of the municipal police power. The most commonly cited justification for such requirements is the alleviation of traffic congestion and the hazards created thereby.

Off-street parking requirements should be subject to the same standards of judicial review as municipal zoning ordinances generally, i.e., that such requirements are constitutional in principle; that they are presumptively valid; and that those who assail the validity of off-street parking requirements must prove their invalidity beyond a reasonable doubt.

The sole basis for invalidating the City of Aspen's off-street parking requirements was the trial court's interpretation that Denver Buick held such requirements to be invalid in principle. It is submitted that such interpretation was erroneous, and that the judgment of the trial court should be reversed. If the interpretation was not erroneous, we urge the Court to overrule Denver Buick and affirm the ability of Colorado's municipalities to adopt reasonable tools for the protection of their citizens from the hazards created by the use of motor vehicles in urban areas.

ARGUMENT

THE TRIAL COURT ERRED IN HOLDING THAT ASPEN'S OFF-STREET PARKING REQUIREMENTS CONSTITUTE A TAKING OF PRIVATE PROPERTY IN VIOLATION OF ARTICLE II, SECTION 15 OF THE COLORADO CONSTITUTION.

In its conclusions of law, the District Court stated:

> Those portions of section 11-1-9 of the Aspen Municipal Code which require that landowners provide off-street parking are violative of Article II, Section 15 of the State Constitution as a taking of private property without just compensation. The Colorado Supreme Court in City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919, has declared such provisions to be unconstitutional.
>
> The defendant has filed a lengthy and well-written brief criticizing the Denver Buick case and showing that of all the states that have considered the constitutionality of off-street parking regulations only Colorado has declared them to be unconstitutional per se. However, this court, like the citizens of this state, is bound to follow the law as announced by the Supreme Court of Colorado. Henderson v. People, 397 P.2d 872. Although this court might disagree with the majority in the Denver Buick case, it is nevertheless bound by it. If the Denver Buick case is to be overruled that is for the Supreme Court, not the trial courts. (f. 152)

The Court thus interpreted Denver Buick as holding that municipal off-street parking requirements are inherently or per se unconstitutional. It is submitted that this interpretation was erroneous.

In Denver Buick, the Supreme Court was called upon to determine the validity of a portion of Denver's zoning ordinance which required the installation of off-street parking facilities in B-6 zoning districts. In one portion of its opinion, the Court specifically found that the requirement was unreasonably discriminatory:

> Third. Are the various provisions and restrictions set forth in Ordinance No. 392 Series of 1956 unlawfully and unreasonably discriminatory in that they impose certain obligations and restrictions upon the property in the B-6 District so as to work undue hardships within that District while favoring the B-5 District by not imposing those restrictions and obligations upon the property within the B-5 District, and thus creating a condition of subserviency by one district in favor of the other?
>
> This question is answered in the affirmative. The trial court determined from knowledge common to any citizen, and from the language of the ordinance itself, that there is no appreciable or apparent difference in the characteristics of District B-6 and B-5 except that in the latter the uses authorized

include operation of a pawnshop or music studio, while these privileges are denied in the B-6 District.

* * *

The regulations of the ordinance as to B-5 do not require off-street parking, but in the B-6 District the ordinance demands off-street parking facilities and sets up a maze of oppressive rules and regulations pertaining thereto. None of these requirements are made as to the B-5 District. Gross floor area provisions are set up in the B-6 District, none of which appears in the B-5 District. The city regulates private property in the B-6 District so as to require off-street parking based on nature and type of the trade or business, use of the building, size of the building to be erected, number of employees in excess of five, the religious belief of employees, the grade in school of children, furnishing services to the B-5 District, protecting an adjoining residential district, and serving as a shopping center for the adjoining residential districts; while no such regulations are required in the adjoining B-5 District although all types of business and buildings permitted are the same in both districts, with the two exceptions above noted. 141 Colo. at 138, 139. (Italics by the Court.)

In another portion of its opinion, the Court stated as follows:

Section 614 of the Zoning Ordinance here in question deals with the subject of off-street parking as related to the several district classifications. In so far as District B-5 (the main down town area) is concerned, it is provided that "Off Street Parking Requirements shall be of no force and effect in this district." But in District B-6 in which the property here involved is located, the ordinance classifies the off-street parking requirements into eight different trade categories, with different parking requirements for each. The utter unreasonableness of these off-street parking requirements is made crystal clear by a letter, introduced in evidence, which was written by defendant to the plaintiff Lou Cohan. 141 Colo. at 130.

While it seems clear that the Court found the particular provisions of Denver's ordinance relating to off-street parking facilities to be unreasonably discriminatory and, for that reason invalid, the opinion admittedly contains language suggesting that all municipal off-street parking requirements are inherently unconstitutional (see 141 Colo. at 128 through 133). Since, however, the Court found the particular requirements to be unreasonably discriminatory, the broader language is not necessary to the opinion and is therefore simply dicta.

Subsequent to Denver Buick, only one Colorado case has dealt specifically with the validity of municipal off-street parking requirements. In Denver v. Redding-Miller, 141 Colo. 269, 347 P.2d 954 (1959), decided approximately two weeks after Denver Buick, the Court stated that its opinion in Denver Buick disposed of the City's contention that the Denver Board of Adjustment had acted erroneously in granting a variance from off-street parking requirements contained in the Denver zoning ordinance. A portion of the Denver Buick opinion was subsequently overruled by the Court in Service Oil Co. v. Rhodus, _____ Colo. _____, 500 P.2d 807 (1972); however, the portion overruled related solely to the authority of Denver to provide for the termination of non-conforming uses.

Other cases decided subsequent to Denver Buick, however, contain language at least suggesting that Denver Buick should not be interpreted in its broadest sense of invalidating all municipal off-street parking requirements. For example, in Westwood Market v. McLucas, 146 Colo. 435, 361 P.2d 776 (1961), Denver rezoned an area from residential to business to permit construction of a shopping center. Plaintiff shop owners attacked the rezoning action and the Court found that none of the plaintiffs was an aggrieved person since their only interest was to halt the construction of the competitive shopping center. The Court concluded its opinion by stating:

> Zoning may not be used as a means of stifling proposed competition.
> In support of the foregoing, see...Denver v. Denver Buick, Inc.... 146 Colo. at 439.

In Bear Valley v. County Commissioners, 173 Colo. 57, 476 P.2d 48 (1970), plaintiff relied on Denver Buick in asserting that the county had unconstitutionally deprived him of the use of his property by refusing to rezone certain property from a residential to a business district. The Court, in refusing to apply Denver Buick to these facts, stated:

> These cases (referring to Denver Buick, among others) are not in point because they involve changes in zoning and the constitutional validity thereof as applied to certain properties.... The constitutional argument (taking of private property without due process) must be predicated upon the acquisition and use of property under one zoning regulation and the unconstitutional deprivation of that property by a change of zoning. 173 Colo. at 64, 65. (Emphasis by the Court.)

In Nirk v. Colorado Springs, 174 Colo. 273, 483 P.2d 371 (1971), the Court again ruled that Denver Buick could give no comfort to a plaintiff complaining of the City's refusal to rezone his property:

> Such a factual setting has no relationship whatsoever to the situation in the Denver Buick case in which the property in question had been zoned for commercial use for more than fifty years. In the Denver Buick case, the issue was whether the property owner could be required to provide off-street parking for business patrons while the business properties in adjoining districts were not similarly burdened. 174 Colo. at 276, 277.

While the above-cited cases do not resolve the questions surrounding the meaning of Denver Buick, they do suggest that the invalidity of Denver's off-street parking requirements arose from factors other than some inherent unreasonableness in municipal off-street parking requirements per se.

By placing a limited interpretation on the opinion in Denver Buick, i.e., that the opinion held Denver's off-street parking requirements to be unreasonably discriminatory and therefore invalid, the Court would bring that opinion into conformance with the general law relating to municipal off-street parking requirements. It appears that no court has specifically held municipal off-street parking requirements to be unconstitutional in principle. Those courts having considered the validity of off-street parking requirements in principle have generally upheld such requirements as a proper application of the municipal police power. See, e.g., Sisters of Bon Secours Hospital v. City of Grosse Pointe, 8 Mich. App. 342, 154 N.E. 2d 644 (1967); Overhill

Building Co. v. Delany, 28 N.Y. 2d 449, 322 N.Y.S. 2d 696 (1971); Yates v. Mayor and Commissioners of the City of Jackson, 244 So. 2d 724 (Miss. 1971); Central Bank and Trust Co. v. City of Miami Beach, 392 F. 2d 549 (5th Cir. 1968); and State ex rel. Associated Land and Investment Corp. v. Lyndhurst, 168 Ohio St. 289, 154 N.E. 2d 435 (1958).

Although not clearly presented with an attack on the validity of off-street parking requirements in principle, other courts have stated that such provisions are generally valid. See, e.g., Chambers v. Zoning Board of Adjustment of Winston-Salem, 250 N.C. 194, 108 S.E. 2d 211 (1959); and Radcliffe College v. City of Cambridge, 350 Mass. 613, 215 N.E. 2d 892 (1966). Courts in many other cases have considered off-street parking requirements with no hint that the requirements might be invalid on their face, apparently assuming their general validity. See, e.g., Windsor Hills Improvement Association v. Mayor and City Council of Baltimore, 195 Md. 383, 73 A. 2d 531 (1950); Price v. Levin, 248 Md. 158, 235 A. 2d 547 (1967); Miami Beach v. 100 Lincoln Road, Inc., 214 So. 2d 39 (Fla. Dist. Ct. App. 1968); State ex rel. Ogden v. City of Bellevue, 45 Wash. 2d 492, 275 P. 2d 899 (1954); Redwood City Company of Jehovah's Witnesses, Inc. v. City of Menlo Park, 167 Cal. App. 2d 686, 335 P. 2d 195 (1959); McKinney v. Board of Zoning Adjustment of Kansas City, 308 S.W. 2d 320 (Mo. App. 1957); Reiser v. Meyer, 323 S.W. 2d 514 (Mo. App. 1959); City of New Orleans v. Leeco, Inc., 226 La. 335, 76 So. 2d 387 (1954); and Congregation Committee, North Fort Worth Jehovah's Witnesses v. City Council of Haltom City, 287 S.W. 2d 700 (Tex. Civ. App. 1956).

The most commonly cited justification for holding municipal off-street parking to be valid in principle is the alleviation of traffic congestion and the hazards related thereto. See, e.g., Sisters of Bon Secours Hospital v. City of Grosse Pointe, supra, 154 N.W. 2d at 652; Overhill Building Co. v. Delany, supra, 322 N.Y.S. 2d at 702; Yates v. Mayor and Commissioners of the

City of Jackson, supra, 244 So. 2d at 726; and State ex rel. Associated Land and Investment Corp. v. Lyndhurst, supra, 154 N.E. 2d at 440. In Chambers v. Zoning Board of Adjustment of Winston-Salem, supra, the court noted that off-street parking requirements, as applied to a housing project, were valid since cars parked upon the street created hazards due to the likelihood of small children darting into the street from behind parked cars. (It should be noted that a number of Colorado municipalities do impose off-street parking requirements in residential zones as well as in business and industrial zones.) The author of a case note at 58 Mich. L. Rev. 1068 (1960) points out that off-street parking reduces traffic congestion and the health and safety hazards related thereto by permitting the elimination of on-street parking, eliminating much illegal parking, and reducing the amount of "riding around the block." In a case note at 9 Kans. L. Rev. 72 (1960), the author stated that off-street parking requirements should be upheld under the general nuisance theory that one should not use his land so as to interfere with public or private rights. See also, Note, 37 Univ. of Detroit L. J. 766 (1960).

Off-street parking requirements, as a part of municipal zoning ordinances, should be subject to the same general standards of judicial review as zoning ordinances generally. This Court has long recognized that municipal zoning ordinances are constitutional in principle. See, e.g., the early opinions of Colby v. Board of Adjustment, 81 Colo. 344, 255 P. 443 (1927); and City of Colorado Springs v. Miller, 95 Colo. 337, 36 P. 2d 161 (1934). In noting the constitutional validity of zoning ordinances in principle, the Court in Colby v. Board of Adjustment, supra, referred to the United States Supreme Court opinion of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In Euclid, the Supreme Court recognized, in general, that zoning is constitutionally permissible so long as it is not arbitrary and is reasonably related to the public health, safety, morals and welfare. Colorado has adopted a similar view. Service Oil

Co. v. Rhodus, supra; Bird v. Colorado Springs, 176 Colo. 32, 489 P. 2d 324 (1971); Wright v. Littleton, 174 Colo. 318, 483 P. 2d 953 (1971); Di Salle v. Giggal, 128 Colo. 208, 261 P. 2d 499 (1953); City of Colorado Springs v. Miller, supra; and Colby v. Board of Adjustment, supra.

Recently, the United States Supreme Court again had occasion to review the constitutional validity of a municipal zoning ordinance. In Village of Belle Terre v. Boraas, 42 U.S.L.W. 4475, announced April 1, 1974, the Court upheld the constitutionality of a zoning ordinance which restricted land use to one-family dwellings occupied by traditional family groups of not more than two unrelated persons. Again, the Court took a broad view of the general validity of municipal zoning ordinances. In discussing Euclid v. Ambler Realty Co., supra, the Court stated:

> The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; the hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities.... The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. 42 U.S.L.W. at 4476.

With reference to the particular zoning requirement in question, the Court stated:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs....The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people. 42 U.S.L.W. at 4477.

Implicit in the language of both Euclid and Boraas is a recognition that one of the legitimate functions of zoning is to reduce the hazards created by the use of motor vehicles in urban areas.

In his dissenting opinion in Village of Belle Terre v. Boraas, supra, Mr. Justice Marshall stated:

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), that deference should be given to governmental judgments concerning proper land use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is not and should not be to sit as a zoning board of appeals.
>
> I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined. See Berman v. Parker, 348 U.S. 26 (1954). And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes. 42 U.S.L.W. at 4479.

This Court, too, has recognized the need to grant municipalities broad legislative discretion in achieving zoning objectives. Nopro Co. v. Town of Cherry Hills Village, _____ Colo. _____, 504 P. 2d 344 (1972). It has granted zoning ordinances a presumption of validity, and has placed upon those who assail zoning ordinances the burden of proving their invalidity beyond a reasonable doubt. See Famularo v. Board of County Commissioners of Adams

County, _____ Colo. _____, 505 P. 2d 958 (1973); Bird v. Colorado Springs, supra; Wright v. Littleton, supra; and Baum v. Denver, 147 Colo. 104, 363 P. 2d 688 (1961).. Off-street parking requirements should receive no less consideration than other zoning ordinances in the eyes of the Court.

It is not suggested, of course, that municipal off-street parking requirements can or will alone resolve the problems of traffic congestion and the public health and safety hazards created by such congestion in urbanized areas. As recognized by Justice Sutton in his opinion in Denver Buick, 141 Colo. at 159, concurring in part and dissenting in part, off-street parking requirements are simply one tool, or one approach, in resolving those problems. Other approaches are needed and used by municipalities, including the construction of municipal parking lots, prohibiting parking along certain streets, providing public mass transportation, and so forth. It is submitted, however, that off-street parking requirements are, in general, useful tools which have and will assist in resolving the problems; that such requirements are reasonably related to the public health, safety and welfare; that such requirements are constitutionally valid in principle; and that any municipality's specific off-street parking requirements should be upheld until there is proof beyond a reasonable doubt that those requirements are arbitrary, discriminatory, or unreasonable.

The City of Aspen's off-street parking requirements were not found by the trial court to be arbitrary, discriminatory, or unreasonable. The sole basis for invalidating Aspen's requirements was the trial court's interpretation that Denver Buick held municipal off-street parking requirements to be invalid in principle. If this Court determines that Denver Buick did not so hold, we urge a reversal of the trial court's ruling. If this Court determines that Denver Buick did hold municipal off-street parking requirements to be

invalid in principle, we urge the Court to overrule Denver Buick and reverse the judgment of the trial court.

CONCLUSION

For the reasons stated and the authorities cited, the Colorado Municipal League prays that the Court reverse the judgment of the trial court and declare the City of Aspen's off-street parking ordinance to be valid and enforceable.

Respectfully submitted,

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